

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

IN RE: )  
 ) Chapter 11  
SUN TS 40, LLC, ) Case No.: 15-54035-BEM  
 )  
Debtor. )

**ENTERPRISE BANK & TRUST'S  
OBJECTION TO DEBTOR'S USE OF CASH COLLATERAL**

Enterprise Bank & Trust ("**EB&T**") hereby files this preliminary objection (the "**Objection**") to the use by SUN TS 40, LLC (the "**Debtor**") of EB&T's cash collateral, respectfully showing the Court as follows:

**BACKGROUND**

1. On March 2, 2015 (the "**Petition Date**"), the Debtor filed its voluntary petition under Chapter 11 of Title 11 of the United States Code.

2. The Debtor has not filed its schedules, statement of financial affairs, or any first day motions. The first meeting of creditors in the Case has not been scheduled as of the date of this Objection.

3. Before the Petition Date, SUN 316, LLC ("**Borrower**") executed a promissory note dated March 26, 2008, in the original principal amount of \$7,215,00.00 (the "**Note**") in favor of Home National Bank, EB&T's predecessor in interest under the loan documents. The obligations under the Note were assumed by the Debtor and other tenant-in-common interest holders pursuant to various Assignment and Assumption Agreements. The Note is secured by, among other things, a Deed To Secure Debt and Security Agreement dated March 26, 2008 (the "**Deed**") and recorded in Deed Book 48741, Page 846, Gwinnet County, Georgia real property records.

4. The Deed covers all real property and improvements in Gwinnett County, Georgia, having a street address of 1000 Hurricane Shoals Road, Lawrenceville, Georgia (the “**Real Property**”), which the Debtor holds as a tenant-in-common with twenty-one (21) other tenants-in-common (collectively, the “**TICs**”). The Debtor holds a 5.55 percent (**5.55%**) interest in the Real Property.

5. On January 2, 2015, EB&T recorded an assignment of the Note, Deed, and all related documents from Home National Bank to EB&T located at Book 53313, Page 87, Gwinnett County, Georgia real property records (the “**EB&T Assignment**”).

6. EB&T holds a properly perfected first priority security interest in the rents (the “**Rents**”) that are being generated on or about the Real Property, pursuant to, among other things, an Assignment of Leases and Rents dated March 26, 2008, recorded in Deed Book 48741, Page 882. In addition, EB&T holds a first priority lien and security interest in, among other things, all improvements, income, and contract rights of the Debtor, and any and all proceeds therefrom.

7. As further security for the obligations under the Note, SUN 1031, LLC, an Arizona limited liability company (“**Guarantor**”) executed a Guaranty of Recourse Obligations dated March 26, 2008 and a Second Guaranty of Recourse Obligations dated March 26, 2008.

8. None of the other TICs have filed bankruptcy.

9. On January 29, 2015, EB&T provided notice to the Debtor and the TICs of the payment defaults under the Note and accelerated all amounts due thereunder. The amounts due were not paid.

10. The outstanding principal balance on the Note is \$6,771,004.00 plus interest, late charges, and attorneys’ fees owed as of the Petition Date. The Note is in default. The non-default interest rate under the Note is 6.69%.

11. The last payment received by EB&T under the Note was August 25, 2014. Since that time, the Debtor and its affiliates have deprived EB&T from any payment on the Note, or any Rents paid on account of the Real Property.

12. The Real Property was scheduled for foreclosure on March 3, 2015, which foreclosure was stayed due to the Debtor's bankruptcy filing.

### **LEGAL AUTHORITY**

13. The Bankruptcy Code provides that a trustee or debtor-in-possession, after notice and a hearing, may "use, sell, or lease, other than in the ordinary course of business, property of the estate." *See* 11 U.S.C. § 363(b)(1); *see also* 11 U.S.C. § 363(c)(1). Nonetheless, any such use of property of the estate is subject to certain express limitations. "[A]t any time, on request of an entity that has an interest in property used, sold, or leased, or property to be used, sold, or leased, by the trustee, the court, with or without a hearing, *shall prohibit or condition* such use, sale, or lease as is *necessary to provide adequate protection* of such interest." 11 U.S.C. § 363(e) (emphasis added). The Bankruptcy Code provides that a debtor-in-possession may not use cash collateral unless, "each entity that has an interest in such cash collateral consents; or the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section." 11 U.S.C. § 363(c)(2).

14. Section 363 of the Bankruptcy Code defines "cash collateral" as any cash, deposit accounts, rents, issues, profits, proceeds, or other cash equivalent . . . ." 11 U.S.C. § 363(a); *see also* 11 U.S.C. § 552(b) (directing that if the security agreement between debtor and a secured creditor extended to property of debtor acquired before the commencement of the case and to proceeds, product, offspring, or profits of such property, then such security interest likewise shall extend to such proceeds, product, offspring, or profits acquired by the estate after the commencement of the case).

15. In this case, the Rents constitute EB&T's cash collateral (hereinafter, the "*Cash Collateral*").

**OBJECTION**

16. EB&T hereby shows that it does not consent to the Debtor's use of any funds constituting cash collateral within the meaning of 11 U.S.C. § 363, including the Rents. EB&T further shows that it does not consent and objects to the Debtor's use of its Cash Collateral prior to receipt of EB&T's approval of its budget, which EB&T has requested from the Debtor, but has not yet received. Additionally, EB&T objects to the Debtor's use of the Cash Collateral unless and until the Debtor can provide EB&T with adequate protection of its interest in the Cash Collateral. Finally, EB&T objects to the extent that the Debtor seeks to use an amount of Cash Collateral that is more than the amount necessary to avoid immediate and irreparable harm to the estate pending a final hearing pursuant to Rule 4001(b)(2) of the Bankruptcy Rules.

17. Without a budget, EB&T has no way to approve or disapprove of the Debtor's continued use of Cash Collateral. EB&T also requires an accounting of the Debtor's income and expenses immediately. Furthermore, this bankruptcy case has been pending now for three (3) business days and the Debtor has not filed any first day motions or even its schedules of assets or liabilities and statement of financial affairs, which concerns EB&T.

18. To allow the use of the Cash Collateral without a mechanism in place for EB&T to review the proposed use of the Cash Collateral would jeopardize EB&T's security interests in the Real Property and the Rents.

19. EB&T further requests that the Court condition such use on the Debtor's provision of adequate protection to EB&T in the form of monthly cash payments, and that the Debtor's ability to use Cash Collateral expire within a reasonable period of time.

20. EB&T further shows that it believes the bankruptcy filing may not have been in good faith, but rather, a filing by one TIC for the benefit all other non-debtor TICs. EB&T intends to seek the entry of the order lifting the automatic stay, and/or seeking other remedies, so that it can proceed with its foreclosure remedy forthwith. This objection is without prejudice to the right of EB&T to seek such relief on an immediate and emergency basis.

**WHEREFORE**, Enterprise Bank & Trust requests that the Court grant relief consistent with this Objection and for such further relief as the Court deems just and proper.

Dated this 5th day of March 2015.

/s/ Gwendolyn J. Godfrey

Gwendolyn J. Godfrey (Ga. Bar No. 153004)

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*Attorneys for Enterprise Bank & Trust*

**CERTIFICATE OF SERVICE**

This is to certify that I have on this the 5th day of March 2015 served **the Objection of Enterprise Bank & Trust to the Debtor's Use of Cash Collateral** by serving electronically on all registered ECF users in this case, and depositing a copy of same in the United States Mail, in properly addressed envelopes, with sufficient postage affixed thereon on the parties shown below:

Sun TS 40, LLC  
68173 Pine Place  
Cathedral City, CA 92234

Paul Reece Marr  
Paul Reece Marr PC  
300 Galleria Parkway NW, Suite 960  
Atlanta, GA 30339

Guy G. Gebhardt  
Office of the US Trustee  
362 Richard B. Russell Building  
75 Spring Street, SW  
Atlanta, GA 30303

CUSA, LLC  
Dante Mancini  
1255 Roberts Blvd., Suite 100  
Kennesaw, GA 30144

SUN 316, LLC  
1400 E. Southern Ave. Suite 225  
Tempe, Arizona 85282

SUN 316, LLC  
4960 S. Gilbert Road, Suite 1-442  
Chandler, Arizona 85249

SUN 1031, LLC  
1400 E. Southern Ave.  
Suite 225  
Tempe, Arizona 85282

SUN TS 22, LLC  
1581 Deer Hollow Way  
Roseville, CA 95661

SUN TS 43, LLC  
P.O. Box 166  
Thomaston, GA 30286

SUN TS 51, LLC  
1000 Hurricane Shoals Rd. NE  
Lawrenceville, GA 30043

SUN TS 42, LLC  
3103 SE 4th Street  
Renton, WA 98056

SUN TS 41, LLC  
1963 So. Lafayette Street  
San Gabriel, CA 91776

SUN TS 37, LLC  
2985 Belden Drive  
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SUN TS 28, LLC  
69 Montsalas Drive  
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Altadena, CA 91001

SUN TS 23, LLC  
4201 E. Fairfield Circle  
Mesa, AZ 85205

SUN TS 25, LLC  
2690 South Los Alto Drive  
Chandler, AZ 85226

SUN TS 26, LLC  
625 James Lee Dr.  
Suwanee, GA 30024

SUN TS 27, LLC  
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SUN TS 29, LLC  
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Ewa Beach, HI 96706

SUN TS 32, LLC  
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SUN TS 47, LLC  
1005 E. Alpine Drive  
Payson, AZ 85541

SUN TS 49, LLC  
64-56 228th St.  
Oakland Gardens, NY 11364

SUN TS 50, LLC  
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Stratton, CO 80836

SUN TS 51, LLC  
627 Union Ave.  
Brooklyn, NY 11211

Gwinnett County Tax Commissioner  
Richard Steele  
75 Langley Drive  
Lawrenceville, GA 30046

SUN TS 41, LLC  
1000 Hurricane Shoals Rd. NE  
Lawrenceville, GA 30043

/s/ Gwendolyn J. Godfrey

Gwendolyn J. Godfrey (Ga. Bar No. 153004)

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